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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 787

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

BENNIE JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8516

F. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant,* versus BENNIE JONES, PETITIONER, *Appellee.*	No. 1229 HABEAS CORPUS

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.,

HARVEY H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta, Ga.

H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.

Counsel for Appellant,

BENNIE JONES, 403 *Meridian St., Huntsville, Ala.,*
In Propria Persona.

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THE UNITED STATES OF AMERICA

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

BENNIE JONES vs. F. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.	No. 1229 HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Bennie Jones, hereinafter referred to as petitioner, relator, respectively shows to this Honorable Court and alleges:

(1) That relator is confined in the United States Penitentiary, at Atlanta, Georgia, and deprived of his liberty, and that he is in charge of F. G. Zerbst, as Warden of said penitentiary, in contravention of relator's rights as guaranteed by the Constitution of the United States.

(2) That relator is a citizen of the United States, and is entitled to the full protection of the provisions of the Constitution, and more particularly the provisions

thereof which guarantee that no citizen shall be deprived of his liberty without due process of law.

(3) That the cause or pretense pursuant to which your relator is confined in said penitentiary and deprived of his liberty is a certain mittimus or order of judgment, witnessed, signed, and entered on the 9th day of April, 1936 A. D. in the year of our Lord, By the Honorable David J. Davis, United States District Judge, in and for the Northern District of Alabama, at Huntsville Division;

(4) That your relator was indicted by the Grand Jurors of the United States in and for the Northern District of Alabama, April term, and charged with the theft of interstate shipment; entered a plea of not guilty, represented by Council Walter Price, Attorney at Law, at Huntsville, Alabama, and was found guilty by a jury and sentenced to 18 months on the 9th day of April, 1936 A. D. in the year of our Lord.

Petitioner:

(1) Contends he should have served both sentences concurrently; relator further states that he entered a plea of guilty in the year of 1934 A. D., and was given a sentence of 22 months in May of 1934 in the year of our Lord. Relator served 17 months and 18 days and was released on conditional release. Relator further states that he has now served on the latter sentence 13 months and 22 days, which was imposed by the Honorable Judge on April 9, 1936. The relator further states that he is unable to secure the indictments of the two sentences. The sentence that was imposed upon the relator in 1934 by the Honorable Judge Grubb (deceas-

ed). The relator further states that he has tried to secure the indictments through a pauperis oath. The relator feels that he should be released on a *writ of habeas corpus* proceedings.

The powers of the United States Courts are statutory Courts, the creators of Congress, consequently, if the Court sentence on your relator under such powers and specifically conferred by Congress. Then the sentence, as imposed, on your relator is void, and null. And he must be released therefore.

Expart Sullivan 10 Okla. C. R. 465. 138.

P. 815, *Ann Cas.* 1916 A 716.

The Court said; *Habeas Corpus* will lie to enquire into the legality of the imprisonment of a person on a void commitment or without due process of law, and to secure his discharge from custody, where he is held, in violation of his Constitutional rights.

Habeas Corpus, remedy on void judgment if a person be imprisoned on a void committment sentence, and judgment he will be released by Habeas Corpus proceeding; Hughes Criminal law, 926—and case cited josllins criminal law 513—sec 22, *People v. Whitson* 74 I 1123 *Exparte Clark.* 126. Gal 235. Pac 546.46 L. R. A. 656. *People v. Stock.* 157 N. Y. 681.

In release. 98 F E d 984.

Habeas Corpus must be granted, when one is detained under a defective committment. See *Republic etc. and Bynum—Dallas Tetas* 376. In the case of *Matters*

v. Ryan (249 V. S. 375, 39, S. C. T. 315, 63 I. E. D, 654.) The Court holds that the *writ of habeas corpus* is a summary means of obtaining justice. But is a real guarantee of the rights of the individual citizen. The appellant had a right of direct appeal, but it is a well established rule in similar cases that where the sentence is found to be void, the original courts, may assume jurisdiction, at any time after the sentence has been imposed, and issue a judgment in accordance with the law. But if the prisoner were to be released, on *Habeas Corpus*, and the Court loose jurisdiction over him, it were better to release several prisoners, from serving their just punishment than to weaken the efficiency of the writ.

That it would be without force. When invoked by some one. Whose real rights were substantially infringed. Wherefore, Relator prays to this Honorable Court to issue a *writ of habeas corpus* in usual form provided by law and statute in such cases made and provided, directed to said Hon. Fred G. Zerbst as Warden of the United States penitentiary, at Atlanta, Georgia, directing that he produce the body of your petitioner before this court at a time, and place therein stated, there to be heard, why he should not be discharged from the custody of said Warden, and for such other, and further relief, as to this Honorable Court may seem just, and proper in the premises. And that your relator will ever pray.

Respectfully submitted,

BENNIE JONES,
48111-A. *Petitioner.*

COUNTY OF FULTON)
STATE OF GEORGIA)ss

AFFIDAVIT

Personally appearing before me, Bennie Jones, who first being duly sworn, deposes and says he has read the foregoing petition, that he knows the contents and allegations sustained therein are true as to such matters as are stated upon information and belief, and this he verily believes to be true, and that he verily believes that he is entitled to the redress sought therein.

BENNIE JONES

Subscribed and sworn to before me, this the 18 day of June Nineteen Hundred and Thirty Seven, A. D.

ERNEST D. ETHERIDGE,
Notary Public—State At Large, Atlanta, Ga.

(NOTARIAL SEAL)

(TITLE OMITTED.)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court, to test the legality of his said imprisonment, and deten-

tion; but that because of his poverty he is unable to pay the cost of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

Wherefore; Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

BENNIE JONES,
No. 48111-A. *Affiant.*

Sworn to and subscribed before me 6-18-37.

ERNEST D. ETHERIDGE,
Notary Public, State at Large, Atlanta, Ga.

(NOTARIAL SEAL)

ORDER GRANTING WRIT IN FORMA PAUPERIS

Read and considered. Let the writ issue as prayed, in *forma pauperis*, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 26th day of June, 1937.

This the 24th day of June, 1937.

E. MARVIN UNDERWOOD, *U. S. Judge.*

Filed June 24th, 1937

(TITLE OMITTED.)

ANSWER

Now comes the respondent in the above-entitled proceeding, and, in obedience to the *writ of habeas corpus*, produces the body of the petitioner at the time and place directed therein; and, pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Northern District of Alabama, directing imprisonment for a period of twenty-two months. A copy of said warrant of commitment is hereto attached and made a part of this return, being marked "Exhibit A". Also attached hereto and incorporated by reference herein is copy, marked "Exhibit B," of petitioner's conduct record sheet, showing respondent's computation of petitioner's period of servitude.

Further answering, respondent says that petitioner was originally committed to the U. S. Industrial Reformatory at Chillicothe, Ohio, under the mittimus marked "Exhibit A." This term was executed in full less deduction for good time, and petitioner was given a conditional release in accordance with the provisions of Section 716b, Title 18, United States Code. Afterwards, he was returned to the penitentiary with a new sentence of eighteen months which was also imposed by the U. S. District Court for the Northern District of Alabama. This sentence began on April 9, 1936, and has now been completely served and executed. Petitioner was confined for the duration of this sentence in the

Federal Reformatory Camp at Petersburg, Virginia. A copy of the mittimus under which petitioner was committed to the Petersburg Prison Camp in the case of the eighteen months sentence is hereto annexed and made a part hereof and marked "Exhibit D."

On March 17, 1936, a parole warrant issued for petitioner's arrest for violation of his conditional release, a copy of which is hereto attached, marked "Exhibit C", and is by reference incorporated in this return. This warrant was never served or executed upon petitioner until after satisfaction of the said eighteen months sentence, but was kept in the files as a detainer, or, we might say, it was lodged at the prison as a detainer. The entry upon the conduct record sheet annexed is significant, which is to the effect that the Parole Board instructed the Warden on May 28, 1936, that after expiration of the second sentence of eighteen months, petitioner as a conditional release violator under Register Number 9616-C is to be held in custody under warrant issued March 17, 1936, return to be entered on warrant and same forwarded to the Parole Board, and revocation to be had at the first meeting of the Board after expiration of said eighteen months sentence. The instructions of the Parole Board were complied with by the prison authorities, and after completion of the eighteen months sentence, the parole warrant was served upon petitioner, he was taken into custody under it, or rather, his custody was continued under it, and he has been taken before the Parole Board, and given a hearing on the question of revocation of his conditional release. This hearing was had on June 26, 1937, and as is the usual practice, the hearing was had before one member of the Board, the evidence

was taken, the recommendation of the Board member was made, and the entire case was continued to a meeting of the full Board, or for consideration by the entire Board at a later time in Washington, D. C., but no final action has yet been taken by the Board.

It will be noted from the return to the parole warrant attached as "Exhibit C," that on June 22, 1937, petitioner completed the second sentence of eighteen months, and is now being held in custody as a conditional release violator to complete the sentence of twenty-two months under which he was conditionally released on Nov. 13, 1935. The conditional release time of petitioner amounted to 132 days.

Since but 132 days remain to be served upon the first sentence, if, as petitioner claims, his two sentences should be construed as running concurrently, the eighteen months term would obviously be the longer time, and we are obliged to admit that the writ would not be premature. Respondent merely contends that the jurisdiction of the Parole Board has not been exhausted, and that its power to revoke petitioner's parole or conditional release is not ousted by reason of the fact that the eighteen months sentence supervened before it

has heard petitioner's case on the question of revocation of conditional release time.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed June 29, 1937.

EXHIBIT "A"

COMMITMENT

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

The President of the United States of America—

To the Marshal of the United States for the Northern District of Alabama and to the Superintendent of

the U. S. Industrial Reformatory at Chillicothe, Ohio,

GREETING:

Whereas, at the Adj. March term of said Court, 1934, held at Birmingham, in said district and division, to wit, on May 25th, 1934, BENNIE JONES, alias Ben A. Jones, alias Bernie Jones, alias "Phylosipede" was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a Correction Institution for and during the term and period of twenty-two (22) months beginning on the date on which he is received at the County Jail for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title 18, U. S. Code (Theft from an interstate shipment of freight).

CERTIFIED—132 days to serve.

6-25-37 E. A. ESTABROOK, *Record Clerk*

And Whereas, the Attorney General of the United States has designated the U. S. Industrial Reformatory at Chillicothe, Ohio as the place of confinement where the sentence of said Bennie Jones (alias Ben A. Jones,

alias Bernie Jones, alias "Phylosipede," shall be served;

Now, this is to command you, the said marshal, forthwith to take said Bennie Jones, alias Ben A. Jones, alias Bernie Jones alias "Phyosipede" and him safely transport to said Reformatory and him there deliver to said Superintendent of said Reformatory with a copy of this writ; and you, the said Superintendent, to receive said Bennie Jones, alias Ben A. Jones, alias Bernie Jones alias "Phylosipede" and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable W. I. Grubb, Judge of said Court, and the seal thereof, affixed at Birmingham, Alabama, in said district, this 25th day of May, 1934.

W. S. LOVELL, *Clerk.*

Mary L. Tortorici, *Deputy Clerk*

(L. S.)

A TRUE COPY:

W. S. LOVELL,
Clerk U. S. District Court
Northern District of Alabama.
By Mary L. Tortorici, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following, to wit: On May 25, 1934 I delivered said Bennie

Jones to the Warden of the Jefferson Co. Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on June 8, 1934, I delivered said Bennie Jones to the Superintendent of U. S. Industrial Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

THOS. J. KENNAMER, *United States Marshal.*

By N. B. Aaron, *Deputy.*

EXHIBIT "B"—CONDUCT RECORD

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA

Record of BENNIE JONES Color Black No. 48111-A Alias Bernie Jones Crime Vio. Interstate Commerce Act Sentence 18 months Fine None Cost None Not Committed Received Apr. 11, 1936 Where convicted N-Ala: Huntsville. Sentenced Apr. 9, 1936 Occupation Janitor Age 19 Sentence commences Apr. 9, 1936 Full term expires Oct. 8, 1937 Good time allowance 108 days. Short term expires June 22, 1937 Residence Huntsville, Ala. Action of Parole Board Sept. 16, 1936; Did not file. WANTED (a) The Par. board instructed on 5-28-36 that after exp. inst. sent, subject, as a Cond. Rel. Vio. under Reg. No. 9616-C, is to be held in custody under warrant issued 3-17-36; return to be entered on warrant and same forwarded to Par. Board; revocation to be had at first meeting of board, after exp. of instant sentence.

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

For Retaking Prisoners Released under Authority

Pub. 210, 72d Congress

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal Process Within the United States:

Whereas, Bennie Jones, No. 2550-Lee was sentenced by the United States District Court for the Northern District of Alabama to serve a sentence of twenty-two months, for the crime of Theft of Interstate Shipment and was on the 13th day of November, 1935, released conditionally from the Federal Reformatory Camp, Petersburg, Virginia.

And, Whereas, satisfactory evidence has been presented to the undersigned Member of this Board that said prisoner named in this warrant has violated the conditions of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Bennie Jones, wherever found in the United States, and him safely

return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 17th day of March, 1936.

ARTHUR D. WOOD,

Chairman, U. S. Board of Parole.

When apprehended communicate with Director, Bureau of Prisons for instructions.

U. S. Penitentiary,

Atlanta, Ga.

June 23, 1937

The within named Bennie Jones on June 22, 1937, completed the sentence of 18 months imposed 4-9-36, and is being held in custody as a conditional release violator to complete the within named sentence of 22 months, under which he was released conditionally 11-13-35.

B. F. B. *Record Clerk.*

EXHIBIT "A"—COMMITMENT

IN THE

DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

The President of the United States of America—

To the Marshal of the United States for the NORTHERN District of ALABAMA and to the Warden of the United States Penitentiary at Atlanta, Georgia.

GREETING:

Whereas, at the April term of said Court, 1936, held at Huntsville, Ala., in said district and division, to wit, on April 9th, 1936, BENNIE JONES, alias Ben A. Jones, Bernie Jones, Phylosipede, was sentenced by said Court, upon his conviction by a jury to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Penitentiary) for and during the term and period of eighteen (18) months beginning on the date on which he is received at the (Penitentiary) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title

18, USC. (Did enter a railroad car containing an interstate shipment of freight from Huntsville, Ala., to Pinckneyville, Ill., with intent to commit larceny therein).

(Defendant convicted on Count No. 1 of the Indictment).

And, Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said BENNIE JONES, with aliases shall be served;

Now, this is to command you, the said Marshal, forthwith to take said BENNIE JONES, with aliases and safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said warden, to receive said BENNIE JONES, with aliases and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

WITNESS the Honorable David J. Davis, Judge of said Court, and the seal thereof, affixed at Huntsville, Alabama, in said district, this 9th day April, 1936.

W. S. LOVELL, *Clerk*
James L. Pugh, *Deputy Clerk.*

A TRUE COPY:

W. S. LOVELL, *Clerk*
U. S. District Court Northern District of Ala.
By James L. Pugh, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following, to wit: On April 9th, 1936 I delivered said Bennie Jones, with aliases to the Warden of the Madison County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on Apr. 11, 1936, I delivered said Bennie Jones, with aliases to the Warden of U. S. Penitentiary at Atlanta, Ga., together with a copy of this commitment.

ALEX SMITH, *United States Marshal*
By J. H. Garth, *Deputy.*

(TITLE OMITTED).

ORDER SUSTAINING WRIT OF HABEAS CORPUS AND DISCHARGING PETITIONER FROM CUSTODY

The above case came on for hearing, and was duly heard and considered.

The record shows petitioner was sentenced by the U. S. District Court for the Northern District of Alabama on the 5th day of May, 1934, to a term of twenty-two months. This term was served, with the exception of 132 days good time allowed, and petitioner was discharged upon conditional release. Subsequently, on the 9th day of April, 1936, he was sentenced by the same court to a term of eighteen months, nothing having been said about whether the sentence should run concurrently or consecutively with the prior sentence. The

two sentences would therefore run concurrently upon the return of petitioner to the custody of the United States. The parole warrant was issued on March 17, 1936. The Parole Board, on May 28, 1936, instructed the Warden to hold the warrant then sent as a detainer against petitioner.

In my opinion, the above facts show that petitioner came into the custody of the United States under both sentences at least as early as May 28, 1936, and that the sentences thereafter ran concurrently.

This case involves the same questions as those in the case of *Kidwell v. Zerbst*, No. 1192 *Habeas Corpus*, decided on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell v. Zerbst,* and upon authority of same;

IT IS CONSIDERED, ORDERED and ADJUDGED that the *writ of habeas corpus* be and hereby is sustained, and that respondent discharges petitioner from custody forthwith.

This 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29th, 1937.

(TITLE OMITTED.)

PETITION FOR APPROVAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause, on the 29th day of June, 1937, wherein the *writ of habeas corpus* was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America,

and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney

H. T. NICHOLS,
Assistant United States Attorney

Counsel for Respondent

Filed June 29, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of $100.00 without sureties.

Dated this 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29, 1937.

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits thereto attached, and said pleadings are hereby settled as the evidence in said case.

This 29th day of June, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed June 29, 1937.

(TITLE OMITTED.)

ASSIGNMENTS OF ERROR

And now on the 29th day of June, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Asistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 29th day of June, 1937, is erroneous:

(1) Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2) Because the court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3) Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4) Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5) Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6) Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

(7) Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the court erred in sustaining

the writ of *habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said *writ or habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed June 29, 1937.

(TITLE OMITTED.)

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said

Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for *habeas corpus* with exhibits attached thereto and order allowing the same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of Court of June 29th, 1937.

4. Petition for appeal and order of Court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed June 29, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,)
NORTHERN DISTRICT OF GEORGIA.)ss:

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 25 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

F. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant*,

versus

BENNIE JONES, PETITIONER, *Appellee*,

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the

seal of the said District Court, at Atlanta, Georgia, this the 3rd day of July, A. D., 1937.

(SEAL) J. D. STEWARD,
Clerk, United States District Court,
Northern District of Georgia,

By C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, e original thereof being on file in the office of the lerk of the United States Circuit Court of Appeals.

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PAGE

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

BENNIE JONES

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwiatkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants

for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920 the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460–465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490.

Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as

the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

BENNIE JONES

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 28 to 40 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8516, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Bennie Jones is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 27 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.